U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

Record of Commission Action
Commissioners Voting by Ballot *

Commissioners Voting: Chairman Ann Brown
Commissioner Mary Sheila Gall
Commissioner Thomas H. Moore

ITEM:

Final Rule for Multi-Purpose Lighters

DECISION:

The Commission voted unanimously (3-0) to issue a final rule to regulate the child resistance of multi-purpose lighters and approved with specified changes a draft Federal Register notice issuing the rule. The Commission also voted unanimously (3-0) to approve a Federal Register notice issuing a final rule to regulate the child resistance of multi-purpose lighters under the Consumer Product Safety Act. (Ref: staff briefing package dated November 19, 1999.)

For the Commission:

Sadye E. Dunn

Sadye E. Dunn
Secretary

* Ballot due December 10, 1999

Chairman Brown statement w/press release, attached

NEWS from CPSC

U.S. Consumer Product Safety Commission

Office of Information and Public Affairs Washington, DC 20207

FOR IMMEDIATE RELEASE
December 10, 1999

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Release # 00-029

CPSC Issues Federal Safety Standard for Multi-Purpose Lighters

WASHINGTON, D.C. - The U.S. Consumer Product Safety Commission (CPSC) today voted unanimously (3 to 0) to issue a federal safety standard for multi-purpose lighters. The new standard will require multi-purpose lighters to be child-resistant. The new standard is intended to reduce the risk of injury and death associated with fires started by children under age 5 playing with multi-purpose lighters.

Multi-purpose lighters are generally butane-filled lighters commonly used to light charcoal and gas grills, pilot lights, camping stoves, candles and similar objects. They also are referred to as utility lighters, grill lighters, fireplace lighters, micro-torches or gas matches.

Since 1988, CPSC has identified 237 fires reportedly started by children under age 5 playing with multi-purpose lighters. These fires resulted in 45 deaths, including 28 deaths of children under 5 years old, and 103 injuries. Since these are only the number of incidents reported to CPSC, they are considered to be a conservative indication of the true extent of the problem.

"I believe today's decision by the Commission is a bold and responsible step in fulfilling our mission to protect American consumers, particularly children, from death and injury resulting from consumer products," said CPSC Chairman Ann Brown.

To meet the requirements of the new federal standard, a multi-purpose lighter must have the same level of child-resistance as required in the Safety Standard for Cigarette Lighters. The child-resistant mechanism must operate safely, function for the expected life of the lighter, and not be easy to deactivate. The child-resistant mechanism also must automatically reset after use.

To give firms sufficient time to design, test and produce child-resistant, multi-purpose lighters, the new standard takes effect one year after its publication in the Federal Register. CPSC is aware of at least two child-resistant, multi-purpose lighters already on the market, and a number of other such lighters are in the final stages of development and testing.

Statement by Chairman Ann Brown

Final Rule on Performance Requirements for Multi-Purpose Lighters December 10, 1999

I voted today to issue a final rule to require that multi-purpose lighters incorporate child-resistant

STATEMENT OF COMMISSIONER THOMAS HILL MOORE
ON THE PROPOSED RULE FOR BUNK BEDS

February 3, 1999

I voted today to go forward with the Notice of Proposed Rulemaking on Bunk Beds.

I do not, however, base my decision on an analysis of substantial compliance. I base it on the fact that the voluntary standard as presently published lacks certain provisions which are necessary to fully protect children from entrapment hazards. Under our regulations we could defer to the ASTM subcommittee to give them time to make these changes. But our regulations do not require that we do so.

I know that the chairman of the ASTM subcommittee has told our staff they would convene a subcommittee meeting to consider the changes. My decision to not defer to this offer should not be interpreted to indicate that the ASTM subcommittee has been unresponsive to the staff's suggestions in the past. In fact, they have been very responsive. But we are at the stage now where Commission action could be more speedy than ASTM action. And the only real objection that has been raised to going forward with the mandatory standard by any subcommittee member has been the concern that we not base it on a failure of substantial compliance.

Should the ASTM subcommittee act to amend the voluntary standard to make it identical to what the Commission staff is proposing, and have it in place prior to Commission action on the final rule, then the Commission will be forced to base its decision on the

degree of substantial compliance with the voluntary standard. I do not think anyone should take comfort in the Commission being in that position. I do not know what my decision would be in that event. While I have reservations about the General Counsel's position, I also am concerned about not taking all possible steps to eliminate the tragic loss of young children's lives due to bunk bed entrapments.

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

STATEMENT OF COMMISSIONER MARY SHEILA GALL DECISION TO ISSUE A NOTICE OF PROPOSED RULE TO ADDRESS CHILDREN'S ENTRAPMENT HAZARDS ON BUNK BEDS

February 3, 1999

Today, I voted to abstain on a motion to issue a Notice of Proposed Rule on children's entrapment hazards associated with bunk beds. I voted to abstain despite my strong inclinations **against** going forward with this rulemaking proceeding. I do not believe that sufficient evidence has been brought forward to justify a preliminary finding that a final rule regulating bunk beds should be adopted. However, I have grave concerns about the staff's narrow and unprecedented interpretation of "substantial compliance" – both with regard to its impact in the present proceeding, as well as its future implications. I abstained because I believe it is **crucial** that we have an open, public discussion of this critical issue. I, therefore, voted with my colleagues to amend the Federal Register notice to include language specifically requesting public comment on the staff's proposed interpretation of substantial compliance.

I believe very strongly that the evidence demonstrates that there has been the requisite "substantial compliance" with the existing voluntary standard. Thus, consistent with our statutes, I believe that the Commission has the legal basis to defer to this existing voluntary standard. As staff notes in the Federal Register notice: "The percentage of currently produced bunk beds that conform to the ASTM standard could be as high as 90% or more." At the very least, such a rate of compliance – greater than compliance with many **mandatory** rules -- creates a presumption of substantial compliance. The staff simply has not produced sufficient evidence to conclude that a mandatory rule would significantly reduce the risk of serious injury.

There may be a need **to modify and improve** the voluntary standard (ASTM F1427-96), as recommended by staff. Experience, however, has demonstrated that there is good reason to anticipate that staff will be able to work with ASTM's F 15 Committee on Consumer Products to accomplish this objective in a timely and efficient manner. Indeed, F 15 Committee Chairman, Joe Ziolkowski, has already proposed this in his 1/27/99 letter to John Preston. This would moot the need to consider the changes recommended in the Federal Register notice in the form of a mandatory rule.

Ordinarily, under such circumstances, I would feel compelled against going forward with this procedure. But these are not ordinary circumstances. My votes today are motivated by my strong desire to seek public comments on the discussion contained in the Federal Register notice interpreting "substantial compliance." I explained in detail, in my statement of January 7, 1999, how this interpretation simply distorts and disembodies the manner in which the Commission has applied

"substantial compliance" in prior proceedings involving the question of deferring to existing voluntary standards. (See attached "Statement"). Indeed, I believe that the interpretation proposed by staff, for the first time, in this Federal Notice notice, explicitly contradicts congressional intent and absolutely defies Congress' strong preference for formulating and complying with effective, voluntary standards.

I am most disturbed by the suggestions contained in the Federal Register notice that: "The Commission concludes that substantial compliance does not exist where there is a reasonable basis for concluding that a mandatory rule would achieve a higher degree of compliance". And that, in order to defer to a voluntary standard, it would be necessary for the Commission to conclude that: "the voluntary standard would achieve **virtually the same degree of injury reduction** that a mandatory standard would achieve." (Emphasis added). I believe that this interpretation is wrong.

In my Statement of January 7, 1999, I proposed an alternative formulation. I argued that a more "flexible", multi-factor approach was more consistent with both precedent and congressional intent. Specifically, I stated:

> My approach – the more "flexible" approach – is to weigh and balance and apply each of [my] factors, and others as well (such as the Congressional preference for voluntary standards), in evaluating whether or not there has been substantial compliance in any particular case. While I agree that a pure "percentage" test does not reflect Congressional intent, I do believe, however, that percentages can provide useful parameters and, in some instances, may suggest a rebuttable presumption of substantial compliance or non-compliance. Similarly, I believe that it is absolutely appropriate to give some weight to the extent to which voluntary compliance levels approach speculative mandatory compliance levels. Obviously, since our ultimate objective is to adequately reduce the risk of injury, an additional factor that must be considered is the effectiveness of the voluntary standard in reducing the risk of injury it was developed to address. These are not, however, alternative approaches. These are all legitimate factors that must be considered before making any final determination.

There may be additional factors, as well that may need to be evaluated. I would, thus, invite the public to comment upon both the interpretation contained in the Federal Register notice as well as my suggestions, and to submit recommendations for the Commission to consider in adopting an appropriate definition of "substantial compliance".

Attachment

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

STATEMENT OF
THE HONORABLE MARY SHEILA GALL
ON A DRAFT NOTICE OF PROPOSED RULEMAKING(NPR) ON BUNK BEDS

January 7, 1999

Today, the staff will brief the Commission on a draft Notice of Proposed Rulemaking (NPR) recommending that a mandatory standard be adopted addressing entrapment hazards associated with bunk beds. The staff has provided to the Commission a package containing a detailed analysis of this hazard and will be elaborating on its findings and analysis.

I have carefully reviewed this package, but I am not as yet prepared to comment upon the staff's substantive recommendations at this time. Indeed, that would be premature. I am still evaluating this information. However, I do believe that it is both appropriate and quite necessary for me to comment at this time upon the staff's analysis of the impact of an existing voluntary standard on the ability of the Commission to promulgate a mandatory rule.

Let me make it clear at the outset that what I am addressing here is a critical procedural matter that goes right to the heart of this Agency's deliberative process. To be succinct, we must address the factors that the Commission can evaluate in determining when it must defer to a voluntary standard. The fact that I am giving some prominence to this matter, does not in any way suggest that I am relegating the substantive issue of bunk bed entrapments to the background. Quite to the contrary. My concerns are considerable!

Staff, however, has done a marvelous job of presenting the Commission with a clear, detailed, factual briefing package addressing this extremely critical hazard. On the other hand, staff's discussion of this procedural matter is both confusing and troubling, suggesting that the Commission must review the question of deferring to voluntary standards within very narrow constraints. This matter must be addressed before we can proceed with our substantive responsibilities.

Section 9(f)(3)(D) of the Consumer Product Safety Act (CPSA), codifies a strong Congressional statement of preference and encouragement for industry to adopt voluntary standards by explicitly prohibiting the Commission from promulgating a safety rule if an existing voluntary standard with which there is "substantial compliance" is "likely to

result in the elimination or adequate reduction" of a risk of injury. Indeed, in the legislative history of the 1981 amendments to this Act, Congress strongly admonished the Commission for its failure to "encourage or support voluntary efforts by industry groups".

As staff notes, neither the plain language of the statute nor its legislative history provide a clear definition of "substantial compliance". This indicates to me that Congress desired the Commission to exercise its judgement and apply a reasonable degree of flexibility in determining whether "substantial compliance" has been demonstrated in any given case. Nonetheless, staff now suggests an extraordinarily narrow and proscriptive interpretation for determining whether or not there is "substantial compliance" that would render meaningless this strong statement of Congressional intent. Specifically, staff offers the opinion that:

> When determining whether there has been or will be "substantial compliance" with a voluntary standard, the Commission should compare the compliance rate of the standard to that expected with a mandatory rule. Where the relevant provisions of the proposed voluntary standard and the adopted and implemented voluntary standard are materially the same, and the mandatory rule would achieve a higher degree of compliance, it may supercede the voluntary standard.

To adopt this interpretation would be to turn clear Congressional intent on its head. Rather than injecting encouragement or support for the promotion of voluntary standards, such an interpretation would discourage and trivialize efforts by industry to use its expertise and innovative capacity to develop and improve voluntary standards. Incredulously, it explicitly creates a preference for mandatory standards over voluntary standards – in direct contradiction to Congress's affirmative embrace of voluntary efforts.

It is intuitive that a mandatory standard will exact a higher degree of compliance than a voluntary standard. Mandatory means mandatory – not discretionary! It's the law! When I vote for a mandatory rule my objective is full compliance. Certainly, there will always be those who either willfully or inadvertently violate the law -- that's why we have a compliance section to enforce the law and impose penalties upon those who break it. Our society may build jails – but it still expects its laws to be obeyed. Just as we expect our rules and regulations to be obeyed. I do not vote for mandatory rules with an implicit wink that says: "Thou shalt not – unless we don't catch you and then you can do what you please!" That is ludicrous!

To defer to a voluntary standard is inherently to accept a lessor degree of compliance. While I am grieved and outraged by any preventable injury or death occasioned by a defective consumer product, this Commission – like any government Agency – must come to grips with its limitations. Accepting "substantial compliance", rather than full compliance, is the nominal price that we must pay for allowing this Agency to reap the enormous benefits of conserving its limited resources and cooperating with industry to set and adhere to self-imposed safety standards that are, nonetheless, required to "eliminate or substantially reduce the risk of injury". What is more, while

expecting some degree of non-compliance under a voluntary standard, this Agency is still empowered to punish violators where their deficiencies result in an unreported "substantial product hazard". Indeed, such penalties, in practice, are the same as penalties imposed upon violators of mandatory safety rules.

Staff's interpretation of the meaning of "substantial compliance" is unprecedented, unsupported and disingenuous. While it cites odd sections of Congressional history and pulls remarks made in the context of CPSC rulemaking out of context, there simply is no reasonable basis for its interpretation. I can state without hesitation that in my seven years on the Commission, never has there been any evaluation of "substantial compliance" based upon the type of comparative analysis being urged here by staff.

As the staff notes in its briefing, Senate Report No. 97-102 provides some explanation as to the meaning of the term "substantial compliance". It states as follows:

> In evaluating whether there will be substantial compliance with the voluntary consumer product safety standard, the Commission should determine whether or not there will be *sufficient compliance* to eliminate or *adequately reduce* an unreasonable risk of injury in a timely fashion. (Emphasis added).

Nothing here suggests that the Commission must compare the degree of compliance under the voluntary standard with the degree of compliance anticipated under a mandatory rule. The Senate simply requires that such compliance be "sufficient" to bring about an "adequate" reduction of risk. These are terms that grant considerable discretion to the Commission. This intent is made even more clear by the House, again as noted by the staff in its briefing papers, in House Report No. 97-158. It states that:

> The Committee has chosen a *flexible* standard of "likely to result in the elimination or adequate reduction" of a risk of injury *because these determinations cannot be reduced to a simple formula*. Instead, the agency must consider whether the submitted standard will reduce the risk to a *sufficient* extent that consumers will no longer be faced with an unreasonable risk of injury. (Emphasis added).

Yet despite the clear evidence that Congress intended the Commission to exercise its discretion in a flexible manner, without imposing any "simple formula", staff somehow concludes that a "simple formula" is required in order to determine whether the goal of "substantial compliance" has been met. Staff's "simple formula" of merely contrasting voluntary compliance levels with mandatory levels cannot be what Congress intended. Indeed, this approach clearly contradicts Congressional intent.

Congress does, however, make it clear that there is a critical relationship between the degree of compliance obtained under the voluntary standard and a reasonable reduction in the risk of injury. Staff seems to concur with this judgement, yet it asserts

that this relationship must be measured by the "simple formula" that it propounds. This misconstrues the intent of Congress.

There is a more responsive and more accurate alternative that is far more consistent with Congress' promotion of voluntary standards measured by a "flexible" approach. Indeed, staff suggests what this approach might be in its briefing. Staff points out that there are "several theoretically plausible ways to interpret the term 'substantial compliance'. It then enumerates three such alternative approaches. In one, a percentage test is applied. The second test would measure risk reduction. The third test is staff's preferred mandatory standard vs. voluntary standard comparative formula. In contrast to staff's analysis, I reject none of these formulas. Each of these methodologies provides some assistance to the Commission in helping determining whether "substantial compliance" has been met. My approach – the more "flexible" approach – is to weigh and balance and apply each of these factors, and others as well (such as the Congressional preference for voluntary standards), in evaluating whether or not there has been substantial compliance in any particular case.

While I agree that a pure "percentage" test does not reflect Congressional intent, I do believe, however, that percentages can provide useful parameters and, in some instances, may suggest a rebuttable presumption of substantial compliance or non-compliance. Similarly, I believe that it is absolutely appropriate to give some weight to the extent to which voluntary compliance levels approach speculative mandatory compliance levels. Obviously, since our ultimate objective is to adequately reduce the risk of injury, an additional factor that must be considered is the effectiveness of the voluntary standard in reducing the risk of injury it was developed to address. These are not, however, alternative approaches. These are all legitimate factors that must be considered before making any final determination.

I absolutely do not agree that the staff's proposed mandatory/voluntary compliance comparison is the sole issue to be evaluated. This flies in the face of Congress' recognition that a "flexible" approach should be adopted by the Commission. It also would neuter the very strong Congressional preference for voluntary standards. Since there will invariable be greater compliance when a standard is mandated by law, to reject the lesser degree of compliance that will attend to a voluntary standard is tantamount to rejecting voluntary standards. This explicitly would violate Congressional intent.

Compliance with voluntary standards does reduce injuries and does save lives. Congress recognized that no Commission, no matter how well funded, no matter how diligent, could ever address and regulate all the potential risks of injuries represented by the millions and millions of consumer products that enter the stream of commerce. Congress thus directed the Commission to defer to or rely upon voluntary standards where appropriate. To adopt the staff's approach to measuring "substantial compliance" would be to frustrate and discourage the voluntary standard process. The inevitable result of this would be to increase injuries and deaths caused by defective consumer products. I could never agree with such a shortsighted and hazardous approach.

As staff points out in its briefing, Congressional intent as to the necessity of encouraging voluntary standards was adamant. The words of Congressman Ritter, cited by staff, could not be any more clear:

> I want to emphasize that it is not the intent of the conference report to discourage CPSC reliance on voluntary standards. Voluntary standards ***can*** usually be developed much more rapidly than can consumer product safety rules, and be just as effective in addressing potential product safety hazards. (Emphasis added).

I certainly agree. What I certainly do not agree with is staff's distortion of Congressman Ritter's statement to maintain that voluntary standards **must** be as effective as mandatory standards in order to warrant deferral from the Commission. The Congressman clearly uses the word "can" – not must or shall or even should. To suggest – as staff does -- that this remark, promoting the utility and efficacy of voluntary standards, demonstrates Congressional insistence that compliance with voluntary standards **must** be synonymous with the level of compliance with mandatory rules to attain "substantial compliance" is simply wrong.

I believe that weighing and evaluating all appropriate factors that can provide the Members of this Commission with insight as to the relative merits of deferring to a voluntary standard is the most responsible approach to adopt in determining whether or not there is "substantial compliance" with a voluntary standard. This is clearly more in line with the "flexible" approach promoted by Congress than is the "simple formula" advocated by staff. The framework of analysis that I prefer provides the Commission with the broad spectrum of analytic tools it needs to make this critical and sensitive determination and fosters its mandate to best protect the public from unreasonable risks of injury presented by defective consumer products.